

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

DIANA OWEN SMITH,

Plaintiff,

v.

OHIO SAVINGS BANK, F.S.B.,

Defendant.

Case No. 2:05-cv-1236-LDG-RJJ

ORDER

Plaintiff Diana Owen Smith seeks damages based upon the credit reporting and dispute investigation procedures of Defendant Ohio Savings Bank, F.S.B., a division of AmTrust Bank. Plaintiff claims Defendant's procedures and notations on her credit report violated the Fair Credit Reporting Act, 15 U.S.C. 1681, and misrepresented Plaintiff's credit report profile and impaired her ability to obtain loans. The parties have filed cross motions for summary judgment (#36, response #39, reply #45), (#37, response #43, reply #44) and supplemental authorities (#46 & #48).

I. Statement of Facts

In May of 2003, Defendant provided Plaintiff with an automobile via a loan and security agreement executed in her name only. Plaintiff's husband was not mentioned on the loan agreement or the vehicle's title. There is no evidence that the husband's financial

1 information was considered in making the loan. Plaintiff paid for the loan from an account
2 held in her name only, but to which both she and her husband contributed.

3 On October 26, 2004, Plaintiff's husband filed a Chapter 13 Bankruptcy petition in
4 the United States Bankruptcy Court for the District of Nevada. Plaintiff did not file for
5 bankruptcy, but was listed as a spouse on her husband's bankruptcy petition form. As part
6 of the bankruptcy filing, Plaintiff's husband also listed the vehicle as an asset which he
7 declared as exempt. This provided Plaintiff's husband with the benefits of a community
8 stay and co-debtor filing. The husband also listed Defendant as a secured creditor and
9 included Defendant on the mailing list of creditors to be notified of the petition.

10 Upon learning of the bankruptcy petition, Defendant transmitted a report to national
11 credit reporting agencies (CRAs) stating that Plaintiff's loan agreement was included in
12 bankruptcy and that Plaintiff's credit report profile should be updated to reflect that notation.
13 While Defendant's communication to the CRAs is not part of the record, Defendant asserts
14 it is common industry practice, in community property states such as Nevada, to place a
15 bankruptcy notation on the file of a non-filing spouse, because the debt is presumed to be
16 communal. However, Defendant's Policy and Procedure Manual contains instructions to
17 leave a consumer information indicator regarding bankruptcy blank on the credit report of a
18 spouse who has not filed for bankruptcy.

19 Plaintiff was unaware of the bankruptcy notation on her credit report profile until she
20 was denied additional financing, on January 13, 2005, from Defendant and another
21 financial institution. Once denied, Plaintiff received a copy of her credit report from
22 TransUnion and Experian. The report contained notations stating "Chapter 7 Bankruptcy,"
23 "Debt included in Chapter 7 Bankruptcy Nov. 30, 2004" and "Discharged through
24 Bankruptcy" regarding Defendant's loan.

25 Plaintiff contested these notations with the CRAs, Experian and TransUnion, on
26 August 10, 2005. Pursuant to the Fair Credit Reporting Act (FCRA), the CRAs transmitted

1 the dispute to Defendant for investigation. Defendant conducted a review of the account
2 and concluded that the account had been referenced in a bankruptcy case but added the
3 notation "paid or paying as agreed" to the credit report. Plaintiff then filed this suit alleging
4 violation of 15 U.S.C. § 1681s-2b. Defendant subsequently removed the bankruptcy
5 notations from Plaintiff's credit report profile.

6 II. Summary Judgment Standard

7 Summary judgment is appropriate if, after a review of the record, viewed in the light
8 most favorable to the non-moving party, see *Adickes v. S. H. Kress & Co.*, 398 U.S. 144,
9 157 (1970), (1) there are no issues of material fact and (2) the moving party is entitled to
10 judgment as matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317,
11 322 (1986). A material fact is one required to prove a basic element of a claim. See
12 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Ultimately, "summary judgment
13 will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that
14 a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at
15 248.

16 A review of the record reveals genuine issues of material fact which preclude
17 summary judgment.

18 A. Defendant's Motion for Summary Judgment

19 1. The Accuracy of Defendant's Notations

20 The Fair Credit Reporting Act (FCRA) was prefaced with a Congressional finding
21 that "unfair credit methods undermine the public confidence . . . essential to the continued
22 functioning of the banking system." 15 U.S.C. § 1681(a)(1). As a general matter, the Ninth
23 Circuit has found that § 1681s-2(a) contains "a flat prohibition" against purposely or
24 negligently furnishing inaccurate information about a consumer to a CRA and "imposes a
25 duty on regular furnishers of information to correct and update the information they provide
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1 so that the information is complete and accurate.” *Nelson v. Chase Manhattan Mortgage*
2 *Corp.*, 282 F.3d 1057, 1059 (9th Cir. 2002) (citations omitted).

3 If the information provided to a CRA is contested by a consumer, the FCRA requires
4 the furnisher of the disputed information: 1) to conduct a reasonable investigation with
5 respect to disputed information; 2) to review all relevant information provided by the CRA;
6 3) to report the results of its investigation to the CRA; and 4) to report inaccurate or
7 incomplete results regarding the notation to all nationwide consumer reporting agencies to
8 which the furnisher provided the information. See *Nelson*, at 1059. In the instant case,
9 Plaintiff alleges inter alia that Defendant violated § 1681s-2 by intentionally or negligently
10 reporting inaccurate information to a CRA, and by failing to investigate and correct
11 inaccurate information once placed on notice by a consumer.
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13 There are genuine issues of material fact regarding the accuracy of Defendant’s
14 notations and the reasonableness of Defendant’s investigative procedures once those
15 notations were contested. Defendant’s bankruptcy notations of “Chapter 7 Bankruptcy,”
16 “Debt included in Chapter 7 Bankruptcy Nov. 30, 2004” and “Discharged through
17 Bankruptcy” viewed in a light most favorable to the Plaintiff, could be found by a jury
18 sufficiently inaccurate to constitute a violation of § 1681s-2. Although the 9th Circuit has
19 yet to rule on the substance of inaccurate reports under §1681s-2, other circuits have held
20 that an inaccurate credit report may violate any section of the FCRA if it provides
21 inaccuracies that render the reported information misleading. See, e.g., *Saunders v.*
22 *Branch Banking and Trust Co. of V.*, --- F.3d ---, 2008 WL 2042620 (4th Cir. 2008); *Dalton*
23 *v. Capital Associated Indus., Inc.* 257 F.3d 409, 415 (4th Cir. 2001); *Koropoulos v. Credit*
24 *Bureau, Inc.*, 734 F.3d 37, 40-42 (D.C. Cir. 1984).
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1 In this case, determining whether the reported information is misleading is a question
2 for the trier of fact. See *Spellman v. Experian Info. Solutions, Inc.*, 2002 WL 799876 (D.
3 Nev.) (denying judgment on pleadings based on an allegedly misleading bankruptcy
4 notation subsequent to divorce). The court finds that a reasonable jury could conclude that
5 the bankruptcy references on Plaintiff's credit report misled potential creditors into believing
6 that Plaintiff had filed for bankruptcy, and that such an inaccurate representation violated
7 the FCRA's standard of reasonableness.

8
9 2. The Reasonableness of Defendant's Investigation

10 There are also genuine issues of material fact regarding Defendant's investigation of
11 the disputed information. Defendant fails to provide evidence regarding the specific actions
12 taken after Plaintiff contested the notations. Rather, Defendant relies upon its employee's
13 belief that Defendant conducted an adequate and reasonable investigation.

14 Significantly, Plaintiff submits that Defendant ignored its own policy and procedure
15 manual, which effectively prohibits bankruptcy notations on the credit reports of non-filing
16 spouses. Defendant does not directly respond to this assertion, and viewing the evidence
17 in the light most favorable to Plaintiff, the court finds that such an irregularity raises a
18 singular issue of fact regarding the reasonableness of the investigation.

19 Finally, Defendant's unexplained removal of the bankruptcy notation from Plaintiff's
20 credit report after the initiation of this litigation also raises factual inquires regarding the
21 appropriateness of Defendant's investigative procedures.

22
23 3. Defendant's Community Property Bankruptcy Presumption Defense

24 Defendant also asserts that it is standard industry practice, among creditors
25 operating in community property states, to place a bankruptcy notation on the credit report
26 of both spouses, even if only one spouse files for bankruptcy. Defendant claims that the

1 vehicle was a community asset of both Plaintiff and her husband, the debt owed on the
2 vehicle was community debt, and the husband reported the vehicle as an asset with the
3 associated debt when he filed for bankruptcy. Defendant also stresses that Plaintiff's
4 husband benefited from a community stay and co-debtor filing in his bankruptcy
5 proceedings which discharged Plaintiff's debt to Defendant.

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7 That such a community property presumption exists does not mean that a furnisher
8 of information is excused as a matter of law from providing misleading information or failing
9 to conduct a reasonable investigation after a dispute. Although Nevada law presumes
10 property acquired after marriage is community property, Nev. Rev. Stat. 123.220, Plaintiff
11 may overcome the community property presumption with clear and convincing evidence.
12 *See Peters v. Peters*, 92 Nev. 687, 689; 557 P.2d 713, 715 (Nev. 1976). Ultimately, a jury
13 may evaluate facts such as whether the spouses were both signatories to the loan, whether
14 the vehicle was acquired with separate property and the intent of the lender when granting
15 the loan. *Lawver v. Norwest Financial*, 109 Nev. 242, 246, 849 P.2d 324, 326 (Nev. 1993).
16 *See also Pryor v. Pryor*, 103 Nev. 148, 150, 734 P.2d 718, 719 (Nev. 1987). Similarly, any
17 benefit that Plaintiff received as a result of her husband's filing would impact the
18 characterization of the property – a subject which remains disputed. In sum, material and
19 genuine issues exist, which merit a jury's factual review.


20 **B. Plaintiff's Motion for Summary Judgment**

21 Plaintiff seeks summary judgment as to liability, relying heavily on this court's
22 determination in *Spellman v. Experian Info. Solutions, Inc.*, 2002 WL 799876 (D. Nev.)
23 which condemned credit reports that "can mislead the reader to [make] inaccurate
24 conclusion[s]." In *Spellman*, however, this court merely ruled that, because of the
25 misleading nature of the information involved, defendant was not entitled to a judgment on
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1 the pleadings. Since *Spellman* did not determine what might be misleading, as a matter of
2 law, it does not apply to the instant analysis. In short, this court finds that issues of fact
3 exist regarding Defendant's statutory compliance and that Plaintiff is not entitled to
4 summary judgment as to liability.¹

5 THE COURT **ORDERS** that Defendant's and Plaintiff's Motions for Summary
6 judgment (#36 & #37) are DENIED.

7 DATED this 3 day of July, 2008.

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11 Lloyd D. George
12 Sr. U.S. District Judge
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25 ¹ Plaintiff's efforts to seek recovery under § 1681i and § 1681e are misplaced. Sections 1681e and 1681i
26 impose requirements upon CRAs, but not upon entities which are merely furnishers of information, such as Defendant.